

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re: )  
 )  
GAF BROADCASTING COMPANY, INC.)  
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 )  
 )  
Licensee of FM Radio Station )  
WNCN, New York, New York )

To: The Commission

**PETITION TO REQUIRE FILING  
OF EARLY RENEWAL APPLICATION**

RECEIVED

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Federal Communications Commission  
Office of the Secretary

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Date: May 18, 1990

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**SUMMARY**

Class Entertainment & Communications, L.P. (Class)  
herein petitions that GAF Broadcasting Company, Inc. (GBC)  
be required to file an early renewal application for WNCN  
(FM), New York, New York. Class is a prospective competing

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**PETITION TO REQUIRE FILING  
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Class Entertainment & Communications, L.P. (Class),  
by its attorneys, hereby petitions that the Commission  
require the filing of an early renewal application for FM  
station WNCN, New York, New York, by GAF Broadcasting  
Company, Inc. (GBC) pursuant to the provisions of Section  
73.3539(c) of the Rules, which states:

"Whenever the FCC regards an application for  
a renewal of license as essential to the proper  
conduct of a hearing or investigation and  
specifically directs that it be filed by a  
certain date such application shall be filed  
within the time thus specified. If the licen-  
see fails to file such application within the  
prescribed time, the hearing or investigation  
shall proceed as if such renewal application  
had been received."

Pursuant to Section 73.1020, WNCN's regular license  
term expires June 1, 1991. GBC would therefore ordinarily  
be required to file a renewal application by February 1,  
1991.

Class is a limited partnership formed for the purpose  
of filing an application for a construction permit for a new

station to operate on the facilities of WNCN which would be mutually exclusive with the renewal application of GBC. As reflected in Declarations of its General Partners attached hereto as Attachments No. 1, 2 and 3, Class is actively proceeding with the preparation of its application. The grant of the instant Petition would clearly permit the early filing and consideration of Class' competing application. The Court has recognized that prospective applicants have standing to request Commission action to facilitate the pursuit of their applications. MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257, 1264 n.24 (D.C. Cir. 1968); Orange Park Florida TV, Inc. v. FCC, 811 F.2d 664 (D.C. Cir. 1987); Coalition For The Preservation Of Hispanic Broadcasting v. FCC, Case No. 87-1285 et al., 66 RR 2d 448, 452-54 (D.C. Cir. 1990) rehearing pending.<sup>1/</sup> In addition, Class' general partners reside within the WNCN service area and one has been a station listener. RKO General, Inc. (WOR-TV), 1 FCC Rcd 1081, 1082 (1986)(WOR-TV).

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<sup>1/</sup>In the latter case, rehearing has been granted at the request of the Commission. The Commission's concern, however, was premised on its view that the decisions under review would not, even if reversed, accord the would-be challengers the right to file an application. Grant of the relief sought by Class would accord it such a right.

**I. A Recent Criminal Conviction of GBC's  
Former Parent And An Official Thereof  
Gives Rise To Several Issues**

**A. The Criminal Conviction**

The principal justification for the grant of the relief sought by Class is the conviction of GBC's former parent, GAF Corporation (GAF), and an officer and director thereof, James T. Sherwin, of criminal stock fraud. The conviction was reported by an amendment to applications for transfer of control (File Nos. BTCH-880322GF and BTCH-880322GG) filed December 29, 1989 and attached hereto as Attachment No. 4. As reflected therein, control of GBC has since passed to a new entity (now also known as GAF Corporation). The Chairman, Chief Executive and controlling stockholder of the new entity is Samuel J. Heyman, who was Chairman, Chief Executive Officer and largest stockholder of GAF (which was then publicly held). Heyman held 9.9 percent of GAF's stock. He was the only holder of more than 5 percent of GAF's stock except for a passive broker-dealer-investment adviser. See Exhibit I-2 of BTCH-880322GF. The December 29, 1989 amendment reflects that Sherwin remains an officer and director of the new GAF as well as a 2 percent stockholder. Sherwin has been an officer and director of GBC for many years both before and after the transfer of control (which was consummated on March 29, 1989); however he resigned his offices with GBC (but not, apparently, the new GAF) upon his conviction.

Criminal fraud is an area that remains of relevance, upon conviction, under the Character Policy Statement, 102 FCC 2d 1179, 59 RR2d 801, 813-14 (1986).<sup>2/</sup> Thus, it clearly encompasses false statement or dishonesty. The Commission has specifically recognized that conviction of securities fraud warranted Commission inquiry on an expedited basis. Seraphim Corporation, 2 FCC Rcd 7177, 65 RR2d 1815 (1987). Stock fraud clearly raises questions as to a licensee's reliability and truthfulness. Moreover, the criminal proceeding involved other indicia of dishonesty, as has been repeatedly pointed out by a petitioner to deny the transfer applications, Listener's Guild, Inc. (Guild), and never denied by GBC. These include conspiracy to falsify records, to deceive and defraud investors and to make improper use of credit. Guild's Petition For Reconsideration filed December 14, 1988 at p.6 (attached hereto as Attachment No. 5 in pertinent part). In its Opposition To Petition For Reconsideration filed January 12, 1989 at p. 7-8 (attached hereto as Attachment No. 6 in pertinent part), GBC, while seeking to minimize the potential significance of the criminal proceeding, does not dispute the Guild's statements concerning the scope of the issues in the criminal proceeding. Prior

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<sup>2/</sup>The amendment indicates that appeals will be taken from the conviction; however, the Character Policy Statement indicates that adjudications by a trier of fact will be considered notwithstanding the pendency of an appeal. 59 RR2d at 820.

thereto, counsel for the Guild had filed a letter dated August 12, 1988 (attached hereto as Attachment No. 7 in pertinent part) making at p.2 n.2 essentially the same points concerning the scope of the criminal proceeding. Counsel for GBC responded by letter of August 19, 1988 (attached hereto as Attachment No. 8). This disputed certain factual inaccuracies in the letter, which did not include the Guild's characterization of the scope of the criminal proceeding.

There are also unresolved questions as to the involvement of Heyman in the criminal misconduct. Thus, in response to a March 31, 1989 Supplement To Petition For Reconsideration filed by the Guild (attached hereto as Attachment No. 9 in pertinent part), GBC filed on April 13, 1989 an Opposition (attached hereto as Attachment No. 10). At p. 3 thereof, GBC states:

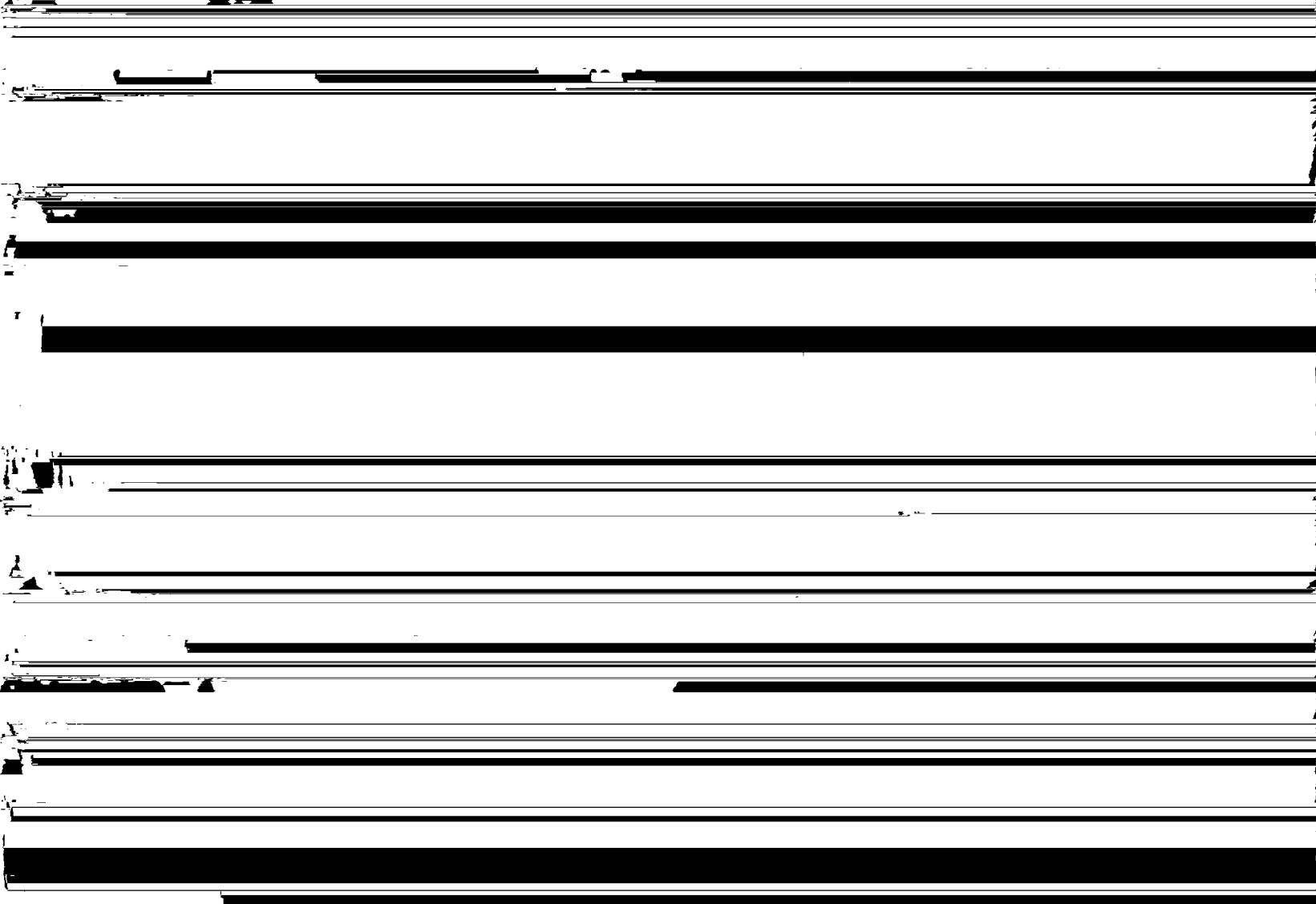
"One can speculate, as does the newspaper article writer, as to the tactical, evidentiary purpose which led the government to request that Mr. Heyman be treated as an unindicted co-conspirator."

Thus, GBC concedes that, in fact, the government viewed Heyman as an unindicted co-conspirator in the criminal misconduct formally attributed only to the corporation of which Heyman was the predominant (if not controlling) principal and a subordinate official thereof. GBC speculates that the government was motivated solely by tactical and evidentiary considerations; however, the Commission has no



basis for believing that the Department of Justice viewed Heyman as an unindicted participant in a criminal conspiracy without an evidentiary basis. This admitted fact plus the subsequent fact of the conviction clearly raises a substantial and material question as to Heyman's involvement in the criminal misconduct that must be resolved at hearing.

The justification for inquiry is heightened by revisions to the Character Policy Statement. Policy Statement and Order, FCC 90-195, released May 11, 1990. Pursuant thereto, all felony convictions will now be considered by the Commission, it being recognized that a willingness to



GBC did file on July 27, 1988 an amendment under Heyman's signature to its applications (attached hereto as Attachment No. 11) reporting the indictment. Little significance can be attached to the mere fact of the reporting of the indictment, involving as it did a well publicized event concerning a publicly traded corporation that could not have been entirely concealed. The amendment, however, provided only the most cursory and vague information concerning the indictment. It gave no information concerning the serious issues subsequently noted by the Guild in its August 12, 1988 letter. The Amendment did, however, contain the following statement:

"Both GAF and Mr. Sherwin have pleaded not guilty to the charges against them. They will vigorously defend the case and are confident of complete vindication. Mr. Heyman and the other officers of Newco and Dorset, having informed themselves of the facts relating to the charges, share GAF's and Mr. Sherwin's confidence in this regard." (emphasis added)

Thus, Heyman, purportedly based on facts known to him, categorically denied to the Commission that there was any basis for the criminal charges against GAF and Sherwin. The fact that these charges ultimately did result in a conviction clearly raises a question as to whether the above representation was false or lacking in candor when made or whether GBC failed to timely amend it to report facts subsequently learned by Heyman that should have undermined his "confidence in this regard."

FCC Form 315, Section II, question 4 requires:

a full disclosure concerning the persons and matters involved, identifying the court or administrative body and the proceeding (by dates and file numbers), stating the facts upon which the proceeding was based or the nature of the offense committed, and disposition or current status, of the matter."

GBC's amendment did not constitute "full disclosure." In analogous circumstances, the failure to provide "full disclosure" pursuant to an identical provision of FCC Form 301 has been found to warrant a misrepresentation/lack of candor issue. Williamsburg County Broadcasting Corp., FCC 90-181, released May 8, 1990 at para. 3. The applicant there merely vaguely reported a pending felony charge which it deemed beyond the Commission's concern (it also ultimately failed to report a conviction; however, that failure was the subject of a separate Section 1.65 issue).

As noted, the Guild filed a Supplement To Petition For Reconsideration, dated March 31, 1989. The Guild therein raised the issue of whether GBC violated Section 1.65 of the Rules by failing to disclose Heyman's treatment by the government as an unindicted co-conspirator. The Guild's pleading generated the above mentioned Opposition filed April 13, 1989 which, as noted, included a back-handed admission that Heyman was so treated by the government. Much is made of the Guild's erroneous statement that this was reflected in the indictment; however, no response is

made to the Guild's point that the facts should have been reported. They clearly should have, especially in view of the blanket and unqualified denial by Heyman in the amendment filed July 27, 1988. Moreover, FCC Form 315, Section II, question 4 would have required disclosure of Heyman's alleged involvement in the matter.

The April 13, 1989 Opposition otherwise characterizes the Guild's action in having even raised the issue as "reprehensible." It further denounces as "irresponsible and reprehensible" a discussion by the Guild concerning evidence arising at the trial, including alteration of a key document by GAF. Opposition at p. 3-4. The Opposition did not, however, provide any facts responsive to the matters raised. The bulk of the Opposition (p. 5-9) consisted of a lengthy attack on the Guild's counsel for making "unfounded charges of criminal conduct" against Heyman.

The fact of GAF's conviction as well as the admitted fact that the Department of Justice viewed Heyman as an unindicted co-conspirator necessarily raises a substantial and material question of fact as to whether he did participate in criminal conduct that must be resolved at hearing, as discussed above. The Opposition clearly served as a denial of any wrongdoing on Heyman's part, raising a separate question as to whether that denial constituted a misrepresentation of fact or lack of candor should the record ultimately demonstrate such involvement.

As noted, GBC did report the conviction of GAF and Sherwin which, again, is of little significance given that there would have been no possibility of concealing this well publicized event. The amendment, however, is again cursory, vague and short on facts (beyond self-serving attempts to minimize Sherwin's role at WNCN). It fails to make the "full disclosure" required by FCC Form 315.

Overall, GBC's conduct is analogous to that which resulted in disqualification in RKO General, Inc. (WNAC-TV), 78 FCC2d 1, 47 RR2d 921, 994-1002 (1980) aff'd in pertinent part sub nom. RKO General, Inc. v. FCC, 670 F.2d 215 , 50 RR2d 821, 835-42 (D.C. Cir. 1981) (RKO). In that case, as here, a licensee was faced with the task of minimizing the impact on its license of alleged misconduct pending before another forum. The licensee responded with a "policy of minimal disclosure." 47 RR2d at 999. In response to allegations raised by other parties, the licensee employed rhetoric designed to convey the impression that the allegations were not merely procedurally deficient but were also without merit, without acting to affirmatively disclose what the facts were. GBC pursued a similar "policy of minimal disclosure" here. It reported only what it could not avoid reporting. It affirmatively represented, based on purported but undisclosed facts, that the allegations at issue in the criminal proceeding were without merit. It attacked contrary allegations in the same fashion as the licensee in RKO

did. Compare GBC's April 13, 1989 Opposition with the rhetoric discussed in 47 RR2d at 996.

The Commission in RKO emphasized the need for full and meaningful disclosure and made clear that licensees could not evade that obligation by playing procedural games with the Commission through disclosures that, even if technically correct, nonetheless skirted the real issue by failing to make full and meaningful disclosure. 47 RR2d at 998-99.

The Court also emphasized that:

"...this means that 'proceedings before the Commission are not private law suits,' and and that the Commission does not function 'as an umpire blandly calling balls and strikes for adversaries appearing before it.'...The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest...As a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known."

50 RR2d at 839. There is a substantial and material question of fact, especially in light of the conviction, as to whether GBC has proceeded in a manner that was neither complete nor accurate in order to minimize Commission concern as to the criminal charges and avoid at least possible delay if not an adverse ruling on the merits.

**C. Other Proceedings Involving Fraud**

The staff's November 14, 1988 letter granting the transfer applications (attached hereto as Attachment No. 12) at p. 7-8 declined to add an issue concerning two civil

proceedings in which jury verdicts found fraud by GAF in the sale of roofing materials. In view of the subsequent conviction for criminal fraud, the result must be reconsidered. The repeated findings of fraudulent conduct by GAF over a period of years, including criminal fraud, places in doubt GAF's reliability and honesty. The clearly relevant conviction for criminal fraud cannot be properly assessed without considering other evidence of fraudulent conduct. The Character Policy Statement does not address the instant situation, i.e., the relevance of misconduct that would not in itself be deemed cognizable under the Character Policy Statement but which is pertinent to assessing other misconduct which is. The ultimate guideline, therefore, must be the requirements of Section 309(e) of the Communications Act of 1934, as amended which mandate a hearing where a substantial and material question of fact is presented or the Commission is otherwise unable to make the requisite public interest finding. The Commission cannot ignore the circumstances now arising merely because they were not expressly

~~addressed by the Character Policy Statement~~

controlling principal Samuel J. Heyman participated in any such misconduct.

2. To determine whether GBC misrepresented facts, was lacking in candor, was grossly negligent or violated Section 1.65 of the Rules in connection with the disclosure of facts concerning a criminal proceeding involving a related person and entity.



the licensee was in the last year of its license term and it was unlikely that a revocation proceeding could be completed prior to the filing of a regular renewal.<sup>3/</sup>

Such a result is clearly more consistent with the public interest than would be the initiation of a revocation proceeding concerning GBC at this juncture. Thus, it would allow public participation in the form both of petitions to deny and competing applications. The Court has recognized that there is a substantial public interest in competition in broadcast licensing and that the adoption of procedures that serve no purpose beyond freezing out potential competitors cannot be justified. New South Media Corp. v. FCC, 685 F.2d 708, 52 RR2d 1 (D.C. Cir. 1982) (New South). The Court therein stated:

"In a series of decisions, this court has sought to guard 'the spirit of the Ashbacker doctrine,' see Community Broadcasting Co. v. FCC, 274 F2d 753, 759 [19 RR 2d 2047] (DC Cir. 1960), and to preserve 'comparative considerations' as a prime factor in broadcasting licensing decisions. See Citizens Communications Center, 447 F2d at 1207 (quoting NBC, Inc. v. United States, 319 US 190, 217 (1943) ('Since the very inception of federal regulation [of broadcasting], comparative considerations as to the services to be rendered have governed the application of the standard 'public interest, convenience, or necessity.')

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<sup>3/</sup>At this juncture, GBC is not quite in the last year of its license term; however, it is likely to be prior to any action on this Petition. In LeFlore, the ordinary expiration date would have been June 1, 1973 and the Commission's action was adopted on July 19, 1972 in response to a petition filed over a year earlier.

ticular, the court has scrutinized closely Commission contentions concerning the need for new or continued service, or for expeditious administrative proceedings, to assure that FCC action does not stray far from '[t]he basic teachings of ... Ashbacker ... that comparative consideration by the Commission and competition between the applicants is the process most likely to serve the public.'... Similarly, the court has attempted close review of Commission policy regarding 'renewal expectancy' to ascertain whether the FCC is according incumbent licensees undue protection to the detriment of the pub-

was still in hearing status. Were the Commission to now initiate a revocation proceeding at this juncture, it could arguably have the impact of insulating GBC from competition for an indefinite additional period of time.<sup>4/</sup> The initiation of a revocation proceeding with an effect of precluding the filing of competing applications could not be justified under New South.

That extraordinary action is warranted is suggested by Seraphim Corp., supra. That case also involved a securities fraud conviction compounded by deception before the Commission (an apparent attempt to transfer the license to the spouse of the wrongdoing principal). Also, Williamsburg County Broadcasting Corp., supra, reflects extraordinary action taken as a result of a felony conviction. LeFlore and New South dictate that such action be in the form of an early renewal proceeding rather than revocation. The extended period of time during which GBC has been excused from regular renewal procedures provides further justification for initiating an early renewal proceeding at this point in view of serious questions as to GBC's qualifications.

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<sup>4/</sup>But see Seaboard Broadcasting Corp., FCC 70-272, 18 RR 2d 849 (1970). The Commission therein decided to consider a competing application notwithstanding the prior initiation of a revocation proceeding.

III. CONCLUSION

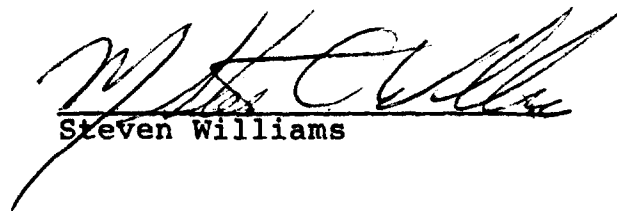
Wherefore it is urged that this Petition should be

**ATTACHMENT 1**

**DECLARATION**

Steven Williams hereby declares under penalty of perjury that the following is true and correct based on my personal knowledge:

I am a General Partner of Class Entertainment & Communications, L.P. (Class). Class is a limited partnership formed for the purpose of filing an application for a new station to operate on the facilities of FM broadcast station WNCN, New York, New York. Class is desirous of filing its application within the earliest time period allowed by the Federal Communications Commission and is actively engaged in the preparation of its application. I am also a resident of New York, New York, WNCN's community of license and hence within its service area.

  
Steven Williams

Date: 5/9/90

**ATTACHMENT 2**

**DECLARATION**

Barbara Norris hereby declares under penalty of perjury that the following is true and correct based on my personal knowledge:

I am a General Partner of Class Entertainment & Communications, L.P. (Class). Class is a limited partnership formed for the purpose of filing an application for a new station to operate on the facilities of FM broadcast station WNCN, New York, New York. Class is desirous of filing its application within the earliest time period allowed by the Federal Communications Commission and is actively engaged in the preparation of its application. I am also a resident of New York, New York, WNCN's community of license and hence within its service

area. I have been a frequent listener to WNCN.



**ATTACHMENT 3**